

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
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ADJUSTMENT OF RATES AND TERMS FOR)
PREEXISTING SUBSCRIPTION SERVICES)
AND SATELLITE DIGITAL AUDIO RADIO)
SERVICES)

Docket No. 2006-1 CRB DSTRA

TESTIMONY OF

BARRIE KESSLER

Chief Operating Officer of SoundExchange, Inc.

October 2006

**BEFORE THE
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WRITTEN DIRECT TESTIMONY OF BARRIE KESSLER

QUALIFICATIONS

I am the Chief Operating Officer of SoundExchange, Inc. (“SoundExchange”). I have held this position since July 2001. Before I became Chief Operating Officer, I served as SoundExchange’s Senior Director of Data Administration, beginning in November 1999. Prior to that, I worked as a database and technology consultant for the Recording Industry Association of America, Inc. (“RIAA”) for seven years. There, I developed the software for the certification system for Gold, Platinum and Multi-platinum record sales, and created the royalty distribution system for the Alliance of Artists and Recording Companies (“AARC”).

My responsibilities as SoundExchange’s Chief Operating Officer include overseeing the collection and distribution of royalty payments for the performance of sound recordings on webcast, cable, and satellite services, including the services at issue in this proceeding. In this capacity, I supervise SoundExchange staff who receive royalty payments from licensees, determine the amounts owed copyright owners and performers, and distribute the royalties to those individuals and entities. Additionally, I oversee SoundExchange’s license compliance

activities, manage its budget, and coordinate its systems requirements, development, and testing. A statement of experience is attached to my testimony.

OVERVIEW

I am providing this testimony to the Copyright Royalty Board (“CRB”) in order to give the Board background on how SoundExchange collects and distributes royalties. I previously testified in the CRB’s proceeding to set rates and terms for webcasting for the 2006-2010 license period, Docket No. 2005-1 CRB DTRA. SoundExchange is submitting that testimony and all related exhibits as designated testimony in this proceeding pursuant to 37 C.F.R. § 351.4(b)(2). I have sought to summarize the salient parts of that testimony and reaffirm that testimony here, including the list of terms that SoundExchange believes must be modified in order to ensure the smooth operation of the royalty collection and distribution system.

I am also submitting this testimony to request that SoundExchange remain the sole collection and distribution agent, and to provide factual support for SoundExchange’s position that neither the Sirius-EchoStar service nor the Capstar service is entitled to the rates available for Preexisting Subscription Services (“PES”).

DISCUSSION

I. SOUNDEXCHANGE’S COLLECTION AND DISTRIBUTION OF ROYALTIES

A. Overview of SoundExchange

SoundExchange is a 501(c)(6) nonprofit performance rights organization established to ensure the prompt, fair and efficient collection and distribution of royalties payable to performers and sound recording copyright owners for the use of sound recordings over the Internet, wireless networks, cable and satellite television networks, and satellite radio services (hereinafter collectively “services” or “licensees”) via digital audio transmissions. SoundExchange is

governed by an 18-member Board of Directors that is made up of equal numbers of artist representatives and sound recording copyright owner representatives.

Collecting royalties from hundreds of services and distributing the royalties to thousands of payees is an enormous undertaking. Working together with statutory licensees, artists, unions and record labels, we endeavor every year to streamline our processes and ensure that the maximum amount of royalties we collect are paid out to those entitled to receive them. SoundExchange has automated many of its functions (and such automation is critical to ensuring efficient distribution of royalties), but, in many cases, SoundExchange staff still must undertake the laborious process of tracking down individuals entitled to royalties and correcting or completing misreported performance data.

Although SoundExchange is a non-member corporation, we frequently refer to those record labels and artists who have specifically authorized us to collect royalties on their behalf as “members.” We have thousands of such record label and artist members, but also pay non-members -- copyright owners and performers alike -- as if they were also members. We do not discriminate between members and non-members; in fact, current Copyright Office regulations require us to treat members and non-members equally when initially allocating statutory royalties.

SoundExchange has been the representative of artists and record labels on a vast array of issues, including notice and recordkeeping and rate-setting through the prior CARP process and the current CRB process. Throughout, on behalf of all artists and record labels, SoundExchange has sought the establishment of marketplace royalties and regulations that enable the prompt, fair and efficient distribution of royalties to all those artists and copyright owners entitled to such royalties.

B. Royalty Collection and Distribution

SoundExchange's core mission is to collect and distribute statutory royalties as efficiently and accurately as possible. For managing royalty collection and distribution, SoundExchange employs the following operational procedures. A flow-chart illustrating these steps is attached as SX Ex. 211 DP to my designated testimony from Docket No. 2005-1, which SoundExchange is submitting as part of its written direct statement in this proceeding.

Step 1: Payment and Log Receipt

SoundExchange's Royalty Administration Department receives from statutory licensees royalty payments and, ideally, three reports: (1) Statements of Account ("SOAs") that reflect the licensee's calculation of the payments for the reporting period; (2) Notices of Election that indicate whether the licensee has utilized any optional rates and terms pursuant to 37 C.F.R. § 262.3(a); and (3) reports of use that log performances of sound recordings. Samples of these reports are provided as SX Ex. 212 DP, SX Ex. 213 DP and SX Ex. 214 DP to my designated testimony from Docket No. 2005-1, which SoundExchange is submitting as part of its written direct statement in this proceeding.

Upon receipt of payment from a licensee, the payment is logged into our licensee database. If this is the first payment from a licensee, a new profile is created for the licensee. If the licensee has previously paid royalties, then the payment is entered under the existing profile. Where licensees operate under more than one statutory license, the royalty payments from a licensee are allocated among the various licenses under which the service is operating. The reports of use ("logs") provided by services are loaded into SoundExchange's system by the Distribution Operations Department. SoundExchange is currently receiving performance logs from Preexisting Subscription Services ("PES"), Satellite Digital Audio Radio Services ("SDARS"), and a handful of other services. The vast majority of new subscription services and

eligible nonsubscription transmission services have not been providing reports of use, although they should begin doing so under the CRB's recent regulations specifying the format and delivery specifications for reports of use. The following discussion of log processing is therefore based principally upon SoundExchange's experience handling logs from the PES and SDARS.

Logs -- which contain text information about the song title, album title, artist name, label and other information, in addition to other transmission information -- sometimes will fail to conform to SoundExchange's existing format and delivery specifications. When a log does not conform to those specifications, it fails to load automatically. SoundExchange personnel must then review the reports, identify errors, obtain a corrected log from the service (or in some cases rectify the errors internally) and then re-upload the reports into the SoundExchange computer software system. It is also frequently the case that services fail to accurately report identifying data for sound recordings by, for example, identifying an artist as "Various," reporting a performer as "Beethoven" or "Mozart," or simply not providing required information. In each of these instances my staff has to research the partially identified sound recording in order to identify accurately the sound recording copyright owners and performers entitled to royalties.

Step 2: Matching

SoundExchange's Distribution Operations staff runs the software program to match the data reported in licensee logs with information in the SoundExchange database identifying copyright owners and performers of particular sound recordings. Our complex log loading algorithm attempts to match identical and similar data elements and combinations of data elements from the incoming log against performance information previously received from the services. If there is a match for a particular sound recording, then the program identifies the corresponding copyright owner and performer information. If there is not a match, we then conduct research as described in step three below.

Each description of a performance on a service's log is retained in our database, even if the description incorrectly identifies a sound recording and SoundExchange staff has corrected it before uploading the log. Our system assumes that services will continue to report the performance incorrectly in future logs. Rather than correct these performances each time they appear in a log, the system matches to the incorrectly reported performances and then applies the corrected information.

Step 3: Research

If there is no match for a sound recording, Distribution Operations personnel manually examine the entry for the sound recording and attempt to determine whether it is new to the SoundExchange database or whether it is already in the database under different identifying information. This research requires a significant amount of staff time. Such research is often required for new releases, works reported for the first time, works from small labels, compilation albums and foreign repertoire. In the case of compilation albums, for example, finding copyright ownership information is particularly time-consuming because, although the album is issued by one label, each of the sound recordings on it could be owned by a different label.

SoundExchange conducts extensive data quality assurance work to ensure the correct association of copyright owners and performers, on the one hand, and particular performances, on the other. For example, the SoundExchange system detects what we call "performances in conflict," a situation in which performances of the same sound recording are reported as being on more than one label. In such cases, we conduct research to determine the correct label for the sound recording. We also review situations in which an artist has performances of different sound recordings with different labels or with "unassociated labels," which may indicate that the label information provided to us was incorrect.

Step 4: Account Assignment

SoundExchange's Account Managers assign sound recording performances to accounts belonging to copyright owners and performers. For example, a performance of Stevie Wonder's *Isn't She Lovely* from his *Songs in the Key of Life* album under the Motown record label (part of Universal Music Group ("UMG")) would be assigned to (1) Stevie Wonder's account and (2) Motown's account. Performances of Motown's sound recordings would be consolidated with other UMG labels and the resulting royalty payment would be made to UMG. Account assignments are based on the copyright owner and performer information provided by the licensee as well as any information already in the SoundExchange database that copyright owners and performers have supplied.

Not all performances can be assigned to a copyright owner or artist account in the time leading up to a distribution. Performances for which a copyright owner or artist account is not identifiable are assigned to a "suspense" account for later review and research. As soon as the identification is made, these royalties are available for distribution in the next scheduled distribution.

Step 5: Royalty Allocation and Distribution

Once we have processed all of the logs by a given class of services for a given period, we are able to allocate royalties. Allocation takes place only after quality assurance steps are taken to ensure accounts are payable, address and tax identification information is complete, performances in conflict are resolved and copyright owner conflicts are resolved (to the extent possible).

Allocation is the process by which a service's royalty payments (made on a channel-by-channel basis) for a given distribution period are paired with the transmissions of sound recordings by that service during that period. The Royalty Administration Department first

identifies the services and associated royalty payments that will be distributed. Minimum fees must be prorated to the period to which they apply. Once I have reviewed and certified the prorating of the minimum fees and the amount of the total fees, those fees are entered into the distribution portion of our system. The allocation and distribution processes are then run.

As stated above, allocation pairs royalties collected from a service with the service's sound recording performances. Once all allocations are completed, "adjustment processing" is run. Adjustment processing involves assigning debits and credits to accounts in order to rectify errors that occurred in a prior distribution. Upon completion of necessary adjustments, the distribution occurs.

Distribution begins with consolidating allocations according to earning entity (*i.e.*, the copyright owner or featured artist who has "earned" the money for tax purposes). For example, if an artist is entitled to a share of royalties from multiple licensees, all of these royalties are consolidated for that artist. The consolidated allocations are then assigned to copyright owners, artists or other payees based on the payment schedule for each. Next, the system generates a payment file, which we transmit to our banking partner. The bank then makes the payments in the form of a check or electronic funds transfer. For performances of sound recordings, 50% of the royalties net of allocable deductions are paid to copyright owners, 45% are paid to featured artists and their third-party payees,¹ and 5% are paid to non-featured artists,² in accordance with 17 U.S.C. § 114(g)(2). Royalties paid for the making of ephemeral phonorecords under 17 U.S.C. § 112(e), net of allocable deductions, are allocated solely to sound recording copyright

¹ A third-party payee is an individual to whom an artist has authorized SoundExchange to pay a portion of the artist's statutory royalties pursuant to a Letter of Direction. Producers are common third-party payees.

² In accordance with 17 U.S.C. § 114(g)(2)(B)&(C), we pay the 5% non-featured artists' share to an independent administrator who is responsible for the further distribution of those funds to nonfeatured vocalists and musicians.

owners. SoundExchange provides each royalty-earning entity with a statement that reflects the performances (and the licenses under which the sound recordings were performed) for which the royalty payment is made. Sample statements for copyright owners and featured artists are attached as SX Ex. 252 DP and SX Ex. 253 DP to my designated testimony from Docket No. 2005-1 CRB DTRA, which SoundExchange is submitting as part of its written direct statement in this proceeding.

SoundExchange's database containing payee information is derived from account information received from record labels and artists, and includes such payees as the copyright owners and artists themselves, management companies, production companies, estates and heirs. We must, however, verify address and other information and secure appropriate tax forms directly from each artist and label. If an earning entity³ fails to provide SoundExchange with tax information, then we can still distribute royalties but must withhold a portion of the royalties pursuant to Internal Revenue Service ("IRS") guidelines. All of the information provided to SoundExchange from copyright owners and performers must be entered manually into the royalty system. We hope to allow copyright owners and performers to input their own information directly into our systems in the future, but there are costs and security issues involved in building those extensions into our current system.

The threshold for distributing royalties to a payee is \$10. Rather than distribute smaller amounts (and incurring significant additional transaction costs), SoundExchange waits until a payee is owed more than \$10, at which point the full amount is distributed.

SoundExchange presently conducts distributions four times a year for statutorily licensed performances (*i.e.*, performances pursuant to 17 U.S.C. §§ 112(e) and 114) and twice a year for

³ An "earning entity" is the person or entity who has earned the royalties from a tax standpoint and does not have to be the person who receives royalties.

non-statutorily licensed performances for which SoundExchange has collected royalties, typically from non-U.S. performing rights organizations who have money for U.S. performers or copyright owners. Payments for which SoundExchange lacks sufficient information to distribute to the appropriate copyright owner or performer are allocated to separate accounts in accordance with 37 C.F.R. §§ 260.7, 261.8 and 262.8. When SoundExchange subsequently obtains the information necessary to distribute royalties to a particular copyright owner or performer, it will do so during the next scheduled distribution. Recipients of royalty payments may contact SoundExchange regarding any perceived errors in distributed payments. Errors in payment distributions may occur as a result of a service's reporting incorrect or incomplete information for a given performance.

Step 6: Adjustments

In the event an improper amount of royalties is paid to an entity (either too little or too much), SoundExchange staff will make adjustments to accounts to correct any errors in a royalty distribution. For example, if Copyright Owner A was incorrectly reported as the copyright owner of Song X and received royalties for Song X, but the actual owner of that song was Copyright Owner B, then SoundExchange would need to credit Copyright Owner B in a future distribution and debit Copyright Owner A's account for the improper distribution. Adjustments typically take the form of an additional payment or a reduced payment to an existing account in the next scheduled distribution. For copyright owners and artists who are newly identified and for whom royalties have been accruing, a new account is created and royalties attributed to the suspense account are transferred to the new account.

C. Challenges Faced by SoundExchange

While these operational steps may sound straightforward and although SoundExchange has gained tremendous efficiencies through its custom software system, the massive scope of the undertaking and the frequency with which novel circumstances arise render the actual task of collecting and distributing royalty payments extremely complex. SoundExchange maintains licensee accounts for more than 3,200 webcast, cable, and satellite services that play sound recordings originating from all over the world, in many cases twenty-four hours a day, seven days a week. SoundExchange distributes royalties to nearly 25,000 copyright owner and performer accounts. To date, SoundExchange has processed over 800 million sound recording performances. And it is important to remember that those 800 million performances are principally from the preexisting subscription services and the satellite services. That number will increase tremendously once SoundExchange starts receiving reports of use from webcasters under the CRB's October 6, 2006 ruling on format and delivery specifications. I would not be surprised if we had to match billions of performances each year once all webcasters start providing reports of use, and we would welcome the opportunity to do so in order to pay even more copyright owners and artists for the use of their recordings.

The process of matching performances of specific sound recordings to individual copyright owners and performers is often difficult because many business arrangements in the recording industry are intricate and continually evolving. For a given sound recording, there may be multiple artists as well as multiple payees entitled to receive a portion of the royalties, as well as the IRS. Further, members of a band often change over the course of the band's existence.⁴ When a band that has undergone changes in membership releases multiple versions

⁴ The examples of band compositions that make distribution of royalties difficult illustrate a few reasons why sufficient data to identify a specific sound recording is critical to SoundExchange's

of the same song, each release may involve payments to different people. Matching the performing band members to a particular sound recording of such a song can be complicated. For example, Fleetwood Mac has undergone multiple changes in membership since it originally formed in 1968, making the task of determining which royalties belong to which members arduous. And Sade is the name of both the individual artist Sade Adu and the band with which she has sung. When SoundExchange receives reports from licensees that list only “Sade” as the performing artist, it can be difficult to determine whether Sade Adu or Sade the band (which includes other members in addition to Sade Adu) is the proper recipient of royalties for a sound recording performance.

Band members may also share royalties on an unequal basis. In the easy case, bands or artists have a corporation that receives the royalties and the corporation assumes responsibility for dividing and distributing royalties among the band members. In some cases, however, SoundExchange itself has to locate the information regarding shares, divide the royalties, and make the payments to each band member.

The general rule we have created is to distribute royalties on a pro rata basis among the members of a band, but that is not always as easy as it may sound. There is no guidance in the statute or legislative history on how SoundExchange should distribute royalties to particular bands. By way of example, is Tom Petty entitled to 50% of the featured artist share with the remaining 50% allocated on a pro rata basis among the members of the Heartbreakers? Similarly, should there be a special split for the Dave Matthews Band, where the name of the band is the name of one of the members of the band? And what about in the case of Diana Ross

ability to distribute royalties to the parties to whom they rightly belong, as SoundExchange explained in its Supplemental Comments concerning the proposed notice and recordkeeping requirements.

& the Supremes versus The Supremes? In one instance Diana Ross is identified separately, but does this mean her share of royalties should increase?

Distributions are also complicated if an artist is deceased and there are multiple heirs (each of whom may have a different share) entitled to the royalties from the performance of a single sound recording; this is particularly true where the artist is a group and more than one group member is deceased.

In an effort to maintain accurate information on artists' arrangements for division of royalties as well as basic contact and tax information, SoundExchange actively engages in artist outreach. SoundExchange regularly attends music industry conferences and speaks to artist management firms, record labels, performing rights organizations and law firms that represent artists. SoundExchange also works with music associations to spread awareness of its services, and it advertises in a variety of media outlets. SoundExchange personnel are available to artists (as well as to copyright owners and licensees) to provide information and answer questions, and we do so on a regular basis. SoundExchange encourages copyright owners and performers to join as members but, as explained above, provides information and distributes royalties to copyright owners and performers regardless of membership.

For undistributed royalties, eight SoundExchange staff members' responsibilities include conducting research to locate artists and obtain their payee information. Even where SoundExchange is able to determine the identity of the artist and record label, that does not mean that SoundExchange knows where to locate them. Locating accurate payee information for a sound recording can be very difficult, especially if the recording is listed in a non-active, deep "catalog" or involves an artist who does not have a U.S. corporate entity designated to receive royalties on his or her behalf. Moreover, even when we locate artists or their managers, we still

need them to return payee information so that we can send their royalties to them. All of these steps mean that tracking down and paying the enormous number of artists and record companies that make use of sound recordings on these services is a daunting task.

Through niche programming, services perform many sound recordings of smaller, less well-known labels and performers who are hard to find (and the problem is magnified if the labels are no longer in existence). SoundExchange spends a significant amount of time addressing this problem in two ways. First, SoundExchange personnel publicize the organization, its mission and its functions in order to ensure that artists and copyright owners are aware that they may have royalties owed to them. We hope that individuals who learn about us will contact us to provide us with the information we need to pay them. Second, SoundExchange performs extensive research to locate and contact individuals who may be entitled to royalties. For example, we rely on databases such as Celebrity Access and All Music Guide as well as information provided by other organizations within the music industry, both domestic and foreign, to locate artists. SoundExchange also utilizes temporary employees and interns to assist in locating individuals and entities entitled to royalty payments. I suspect that the number of “difficult-to-pay artists” and labels will increase tremendously when webcasters start providing reports of use to SoundExchange in light of the CRB’s promulgation of format and delivery specifications.

Under my direction, SoundExchange has conducted a total of thirteen royalty distributions covering over 800 million sound recording performances. To date, SoundExchange has allocated more than \$83 million in royalties. SoundExchange strives to minimize the administrative costs associated with royalty collection and distribution, and it has decreased

those costs each year that it has been in operation. SoundExchange maintains a staff of fewer than 30 individuals. We had administrative costs (exclusive of expenses incurred in participating in rate adjustment proceedings) of 7.6% of total revenue for 2005.⁵ This is a remarkable accomplishment, given the short time that SoundExchange has been in existence. For comparison purposes, I believe reported administrative costs for the American Society of Composers, Authors and Publishers (“ASCAP”) and BMI are typically higher.

II. A SINGLE COLLECTIVE SHOULD BE DESIGNATED TO COLLECT AND DISTRIBUTE ROYALTIES.

As a practical matter (and generally as a legal matter as well), SoundExchange (or its precursor) has operated as the sole collection and distribution agent for royalties under the Section 112 and 114 licenses. SoundExchange requests that it remain the sole collective.

In other proceedings Royalty Logic, Inc. (“RLI”) has asked the Board to create a system with multiple Designated Agents all administering the same statutory license rates and terms. I expect RLI may make a similar request in this proceeding. Under the guise of seeking “competition” among collectives, RLI has sought to undermine copyright owners and performers at every turn. RLI is wholly-owned subsidiary of Music Reports, Inc. (“MRI”), which works primarily for users of copyrights seeking to ensure that its clients pay the lowest possible royalty rates. RLI and MRI share all the same employees and officers. MRI/RLI has provided witnesses to support lower rates sought by webcasters in each of the webcasting proceedings before the CARP and the CRB. Put simply, RLI is not an appropriate choice to serve as a collective to administer the statutory license on behalf of copyright owners and performers.

In my testimony in Docket No. 2005-1 CRB DTRA, I discussed the problems associated with a system that includes more than one collection and distribution agent. That testimony

⁵ The administrative rate for 2006 will depend in part on the royalty rates established by the CRB for webcasters, litigation costs, and final royalties collected for the year.

remains accurate today. SoundExchange's system presently contains entries for 150,000 copyright owners and performers⁶ and over 800,000 sound recordings. For the system to recognize multiple agents, SoundExchange would have to expend significant resources, both human and monetary, to create the accounting platform necessary to track innumerable distributing agent relationships, keep accounts current when entitled parties change affiliation with multiple agents, and still ensure timely distributions. Adding multiple agents would not only create administrative costs and burdens, but would also result in substantial delay in distributing royalties owed. The resulting complexity and administrative burden would serve no one and would lead only to a large number of disputes between collectives -- disputes that might end up back before this Board (although it is unclear whether the Board has jurisdiction to resolve them).

To me, a multi-agent system is anathema to the concept of an efficient licensing system. It is worth noting that administering a statutory license is far different from what ASCAP, BMI, and SESAC -- the musical works performing rights organizations -- do. Those organizations all engage in direct licensing. They represent their members (and only their members) and are able to compete for members by negotiating different rates and terms for collection and distribution of royalties. They only collect and distribute monies for their own members, know precisely what works they are administering, and have no responsibility to anyone other than their members. Under the Copyright Act, SoundExchange is in the position of administering a statutory license whose rates and terms are set by this Board. There cannot be "competition" between collectives on rates and terms; the only "competition" would be created by one collective trying to free-ride

⁶ For example, Paul Simon as a solo artist and Simon & Garfunkel as a group are two such performers of the 150,000 even though Paul Simon may receive a single check for all of his performances as a solo artist and as a member of a group.

off the efforts of another, as RLI has done in the past and appears poised to do in the future. Moreover, because many copyright owners and performers will be members of no organization, there must be an entity that has the responsibility of locating them and ensuring that they too receive the royalties to which they are entitled. SoundExchange (or its predecessor) has undertaken that responsibility since royalties began being paid under Section 112 and Section 114 of the Copyright Act.

Where a statutory license has specified rates and terms, it only makes sense for a single entity to provide administration. As I discussed in my prior testimony, if multiple collectives administer the same license, each with their own rules about what falls inside and outside the statutory license, how much each service owes, and how much each artist or record company is owed, the collection and distribution process will grind to a halt.

III. MODIFICATIONS NEEDED TO LICENSE TERMS

In my testimony in the webcasting proceeding, I recommended a number of changes to the terms governing the operation of eligible nonsubscription transmission services and new subscription services. SoundExchange's experience over the past several years demonstrates that a few of the terms found in 37 C.F.R. Part 262 must be modified to facilitate the prompt, fair and efficient administration of the statutory licenses. I propose that those same terms be modified in this proceeding as well in order to promote the statute's overall goal of providing fair compensation to artists and record labels. SoundExchange requests that the CRB modify the terms accordingly.

I also want to reiterate briefly SoundExchange's long-standing request for census reporting. SoundExchange has previously submitted extensive comments on recordkeeping and, in particular, the need for census reporting in response to the Copyright Office's and the Board's notice and requests for comments in connection with their rulemakings on recordkeeping. I will

not belabor what we have said in those submissions, but I emphasize here that accurate data is critical to the integrity of the collection and distribution process that I have described above. As SoundExchange's comments explain, receiving reports of use in census form and in a uniform format is the only way to ensure that copyright owners and performers receive accurate payments for the use of their sound recordings. In Docket No. RM 2005-2, SoundExchange submitted a Declaration from Barry Massarsky, the President of an economic consulting firm, which discussed some of the inadequacies of sampling that would result in copyright owners and artists being underpaid. I am attaching that Declaration here as further support in this proceeding. *See* SX Ex. 001 DP.

In addition, SoundExchange would like to ensure that the Board makes clear that the definition of revenues for any of the licenses should include in the base of revenues against which a percentage is to be applied all revenues "paid or payable." We have had experience with services not collecting revenues from third parties (either as a de facto discount or possibly in exchange for some other consideration). The result is that some revenue that should be attributed as part of the revenue base is hidden and thus not counted. That is not fair to artists and record companies on whose behalf SoundExchange is collecting royalties.

IV. THE SIRIUS-ECHOSTAR SERVICE

I am aware that the Register of Copyrights recently issued an Order that compels the conclusion that Sirius's service over EchoStar's DiSH Network is not a PES. In briefing that issue to the CRB and the Register, Sirius claimed, among other things, that SoundExchange had "acquiesced" to Sirius's claims by accepting and depositing royalty payments from EchoStar. I am providing this additional testimony to demonstrate the falsity of Sirius's claim.

It appears that Sirius began making transmissions over the EchoStar network in the spring of 2004. At that time, Sirius did not inform SoundExchange directly; rather, Sirius filed a Notice of Use of Sound Recordings under Statutory License with the Copyright Office (but not with SoundExchange) that checked virtually every box on the form. As I noted in my prior testimony, however, filing a Notice of Use does not mean that a service is actually making transmissions of any particular kind, and SoundExchange does not necessarily know that a service is making transmissions -- or what types of transmissions it is making -- when it receives payments, statements of account, and reports of use from a service.

Sirius did not, however, pay SoundExchange for its EchoStar transmissions at all until May of 2005 -- approximately a year after it apparently started being carried on the EchoStar network. Even at that time, and to this day, Sirius did not indicate to SoundExchange that it was claiming that its service over the EchoStar Network was eligible for the PES rates in 37 C.F.R. Part 260. In violation of the regulations governing the PES (as well as similar regulations governing new subscription services), Sirius provided no Statement of Account and no information about how the royalties were being calculated. Rather, Sirius simply sent checks with the legend "Sirius-EchoStar." In addition, if Sirius was seeking to claim the benefits of the PES statutory license, then it would have been required by 37 C.F.R. Part 260.4(b) to submit monthly statements of account on a form provided by the designated agent (SoundExchange). Sirius failed to do so.

In the summer of 2005, SoundExchange's general counsel repeatedly sought clarification from Sirius concerning the basis on which Sirius was paying for its EchoStar service. Sirius indicated that it would provide additional information about how Sirius was paying, but repeatedly failed to do so. Sirius then filed a written direct statement in Docket No. 2005-1 CRB

DTRA indicating that it believed that its EchoStar service was eligible as a PES. That statement -- at least in the public version that I have been allowed to see -- did not explain how Sirius was calculating its royalty payments.

Since that time, Sirius has continued to make payments apparently claiming to be a PES, but, in violation of the statute and regulations, it has refused to provide Statements of Account for any of its payments. It is not enough to make payments. A service operating under Part 260 must comply with its terms. *See* 37 C.F.R. Part 260.1(b). Sirius has also refused to explain how it is calculating its royalty payments. In response to each payment, SoundExchange has informed Sirius in writing that Sirius's position that its EchoStar service is eligible for the PES rate is without merit, that Sirius is in violation of the statute and regulations, and that SoundExchange's acceptance of partial payment of Sirius's true liability (once ultimately determined) was not a waiver of SoundExchange's legal position or remedies (or the remedies of copyright owners and performers). I am providing the correspondence between SoundExchange and Sirius as an exhibit. *See* SX Ex. 102 DR.

Thus, at no point has SoundExchange ever acquiesced to Sirius's claims. Rather, SoundExchange has, for more than a year, maintained that the EchoStar service is not eligible for the PES rate, and has sought the basis on which Sirius was paying royalties, but Sirius has utterly refused to provide any such basis.

V. THE THP CAPSTAR/DMX SERVICE

I am aware that in the context of SoundExchange's motion for referral in this proceeding regarding the conditions under which an entity may be a preexisting subscription service, the Board has reserved as an issue of fact whether Capster is the successor to DMX. *See* CRB Order (August 21, 2006). I would like to provide the Board with the following information and to

emphasize that SoundExchange has always taken the position that Capstar is not a successor to DMX and not entitled to the rates available for Preexisting Subscription Services. *See* SX Ex. 002 DP (Referral Motion and Exhibits, May 4, 2006).

In February 2005, one of the specifically identified PES -- DMX Music, Inc. -- filed a chapter 11 petition in the United States Bankruptcy Court for the District of Delaware. In the Bankruptcy Court, SoundExchange objected to DMX's efforts to assign its PES Compulsory License, and DMX stated in court that it never intended to assign the license. *Id.*

Capstar purchased a portion (but not all) of DMX's assets from the bankruptcy estate. In doing so, it (1) denied that it was a successor to DMX, (2) specifically excluded the PES Compulsory License from the list of obligations it was assuming, and (3) disclaimed any responsibility for the approximately \$2.6 million in statutory royalties that DMX owed to SoundExchange. *Id.* Portions of the record in the bankruptcy proceeding are included in SX Ex. 002 DP.

After purchasing those assets and denying DMX's liabilities, Capstar then reversed course and filed a Notice of Use of Sound Recordings Under Statutory License with the Copyright Office, claiming eligibility for the PES Compulsory License. Capstar also filed a Notice of Intent to Participate in Docket No. 2006-1 CRB DSTRA, again claiming that it was a PES. *Id.*

SoundExchange has consistently informed Capstar that it believes that Capstar is not a successor to DMX and not entitled to the rates available for Preexisting Subscription Services. I am attaching as an exhibit letters that SoundExchange has sent to Capstar in which SoundExchange repeatedly made its position very clear and expressly reserved its rights and the rights of its copyright owner members to pursue claims against Capstar/DMX for improperly

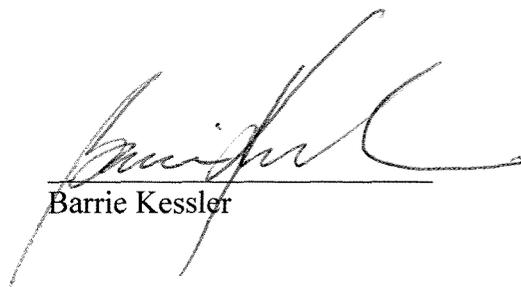
claiming the benefits of a Preexisting Subscription Service. *See* SX Ex. 101 DR (correspondence).

CONCLUSION

SoundExchange has developed an effective and efficient mechanism for accomplishing the enormous task of collecting and distributing royalties for the hundreds of millions of sound recordings performed annually under Sections 112(e) and 114 of the Copyright Act. To maximize that distribution of royalties, SoundExchange should remain the sole collection and distribution agent. The existing regulations should also be amended to account for the additional issues discussed in my testimony in Docket No. 2005-1 CRB DTRA. In addition, neither the Sirius-EchoStar service nor the Capstar service is entitled to the rates available for Preexisting Subscription Services.

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge and belief.

Date: 10/27/06


Barrie Kessler



Bio

Chief Operating Officer Barrie Kessler

Barrie Kessler has been SoundExchange's COO since July of 2001. As COO, she manages the infrastructure and personnel of the organization and implements various strategies to maximize the overall collection and distribution of royalties to SoundExchange's labels and artists.

Ms. Kessler brought over 15 years of database design and integration to SoundExchange, having served as principal consultant for numerous national and international corporations, including many within the U.S. sound recording industry. As the chief operating officer and information specialist for SoundExchange, she spearheaded the design and implementation of the Royalty Distribution System. Ms. Kessler is also charged with quality assurance of performance log administration. She provides technical expertise regarding reporting requirements both internally and before the Copyright Office. The evaluation of emerging and existing technology solutions for webcast performance tracking and assisting licensees with reporting compliance with the statutory license granted by the Digital Performance Right in Sound Recordings Act of 1995 (DPRA) and the Digital Millennium Copyright Act (DMCA) are conducted under Ms. Kessler's leadership.

Prior to SoundExchange, she served as Principal of Rock Creek Systems, an information technology consulting firm, where Ms. Kessler oversaw systems and database design, knowledge management, programming and data analyses for clients. Notable projects include the development of a broadcast monitoring data collection and reporting system for collecting rights societies, record companies, artists and governments in Brazil and Argentina and implementing the technology for establishing a database for a centralized musical recordings warehouse. As part of her consulting for RIAA programs, Ms. Kessler developed the certification system for Gold, Platinum and Multi-platinum record sales and created the royalty distribution system for the Alliance of Artists and Recording Companies (AARC).

Ms. Kessler's previous work included serving as Director of Systems for RSA, Inc. in Washington, D.C. where she directed project teams that provided

analytical and application design services to corporate clients. In that capacity, she created EIS systems for automating workflow and billing information for a major photojournalism corporation. She was also responsible for all aspects of the company's network administration.

Ms. Kessler also has extensive experience abroad having served two years as a database consultant for Price Waterhouse and DOS Computer Center in Madrid, Spain.

Ms. Kessler holds a Bachelor of Science degree in accounting and economics from Lehigh University.

Exhibits Sponsored by Barrie Kessler

Exhibit No.	Description
SX Ex. 001 DP	Declaration of Barry M. Massarsky in Docket No. RM 2005-2 (Aug. 26, 2005)
SX Ex. 002 DP	Motion by SoundExchange for Referral of Novel Material Question of Substantive Law Concerning the Preexisting Subscription Service Compulsory License in Docket No. 2006-1 CRB DSTRA (May 4, 2006)
SX Ex. 101 DR	SoundExchange correspondence with DMX Music
SX Ex. 102 DR	SoundExchange correspondence with Sirius Satellite Radio Inc.